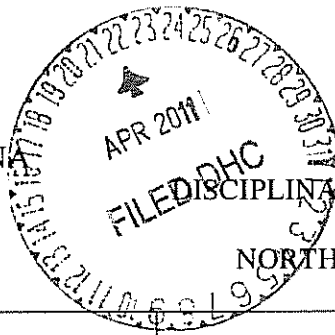


STATE OF NORTH CAROLINA  
WAKE COUNTY



BEFORE THE  
DISCIPLINARY HEARING COMMISSION  
OF THE  
NORTH CAROLINA STATE BAR  
11 DHC 13

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

BENJAMIN S. SMALL, Attorney,

Defendant

COMPLAINT

Plaintiff, complaining of Defendant, alleges and says:

1. Plaintiff, the North Carolina State Bar (hereafter "State Bar"), is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar promulgated thereunder.

2. Defendant, Benjamin S. Small (hereafter "Defendant" or "Small"), was admitted to the North Carolina State Bar on 3 December 2002 and is an Attorney at Law subject to the rules, regulations, and Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

3. During the relevant period referred to herein, Small was actively engaged in the practice of law and maintained a law office in Concord, Cabarrus County, North Carolina.

#### **FIRST CLAIM FOR RELIEF**

4. Paragraphs 1 through 3 are re-alleged and incorporated herein.

5. Small was appointed as counsel for the defendant in the Cabarrus County case of *State of North Carolina v. James Neal Halley*, 07 CRS 53055. Halley was charged with child abuse resulting in serious bodily injury, a Class C felony.

6. In August 2008, Small filed a motion for speedy trial on Halley's behalf. Soon thereafter, the case was scheduled for trial during the 19 January 2009 session of court.

7. Small was notified by 23 September 2008 memo from the prosecutor that the Halley trial was scheduled for the 19 January 2009 session of court.

8. On 4 December 2008 and less than 90 days from the scheduled trial in the Halley case, Small filed a Designation of Secured Leave for the dates of 21-23 January 2009 in an effort to secure leave so that he could attend a continuing legal education class.

9. Small failed to file his Designation of Secured Leave in accordance with the rules and within the time allotted under the rules.

10. On 26 November 2008, Small filed a motion in the Halley case entitled "Motion to Recuse for Conduct Prejudicial to the Administration of Justice" (hereafter "motion to recuse"). Pursuant to this motion, Small sought a court order recusing the Office of the District Attorney from further participation in Halley's prosecution.

11. There was no basis in law or fact for the motion to recuse.

12. Small's motion to recuse impugned the integrity of the ADA assigned to the Halley case and the entire DA's office.

13. Small's motion to recuse was heard by Superior Court Judge Erwin Spainhour on 18 December 2008.

14. The Superior Court denied Small's motion, specifically rejecting Small's factual allegations as completely without merit and concluding that there was "no basis in fact or law" for the motion. The Court found that Small's motion to recuse was "vexatious" and "filed for the improper purpose of harassing [the ADA]."

THEREFORE, Plaintiff alleges that Defendant's foregoing actions constitute grounds for discipline pursuant to N.C.G.S. § 84-28(b)(2) in that Defendant violated one or more of the Rules of Professional Conduct in effect at the time of his actions as follows:

- a) By filing a designation of secured leave less than 90 days before the proposed leave period and after the Halley case had been scheduled for trial during the leave period, Small knowingly disregarded an obligation under the rules of the tribunal in violation of Rule 3.4(c); and
- b) By filing the motion to recuse without basis in law or fact which impugned the integrity of the DA's Office, Small filed a frivolous motion and raised an issue therein for which there was no basis in fact or law in violation of Rule 3.1, used means that had no substantial purpose other than to embarrass or burden a third party in violation of Rule 4.4(a), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d).

#### **SECOND CLAIM FOR RELIEF**

15. Paragraphs 1 through 14 are re-alleged and incorporated herein.

16. In 2006, the Clerk of Cabarrus County Superior Court (the "Clerk") appointed Small to serve as guardian ad litem (GAL) for Clevie Hatley in a proceeding to determine Hatley's competence and determine whether a general guardian should be appointed for Hatley.

17. After a contested hearing in November 2006, Hatley was declared incompetent. Hatley's daughters, Gail Erwin and Sheila Furr were appointed as his general guardians.

18. After the November 2006 hearing, Hatley's general guardians paid Small's \$75.00 per hour GAL fee for the work he performed during the hearing.

19. In 2007, Hatley hired Attorney Russell to assist him in seeking to restore his legal competency.

20. In September 2007, Russell filed a Motion to Restore Competency on Hatley's behalf. The Clerk again appointed Small as GAL for Hatley in the action to restore competency.

21. Attorney Rogers represented the general guardians in opposition to Hatley's motion to restore competency.

22. The Clerk denied Hatley's motion to restore competency and Hatley appealed to Superior Court for trial in December 2008.

23. The Honorable Cressie H. Thigpen presided over the Superior Court jury trial on Hatley's motion to restore competency. Hatley died before the trial on his motion to restore competency was concluded.

24. After Hatley's death, Small submitted to the Hatley Estate for payment his fee invoice for services he rendered to Hatley as GAL in December 2008.

25. The fee Small sought to collect was \$100.00 more per hour than the fee he previously sought and accepted while serving as GAL for Hatley in 2006.

26. On 21 May 2009, Attorney Grant, counsel for the Hatley Estate Administrator responded to Small's invoice by sending a letter to Small seeking to settle Small's claim for GAL fees, which the Hatley Estate Administrator thought was excessive.

27. Small did not respond to Attorney Grant's letter.

28. On 21 July 2009, the Clerk entered an order instructing the Hatley Estate Administrator to obtain court approval before paying any GAL fee to Small.

29. On 20 August 2009 and before the Hatley Estate Administrator submitted any proposed fee for Small to the Clerk for approval, Small filed a Complaint and Notice of Hearing in District Court Case No. 09 CVD 3465 (the "Complaint").

30. Pursuant to the Complaint, Small sought judgment against the Hatley Estate, its Administrator and Beneficiaries individually and collectively for GAL fees that Small claimed he was owed for his service as GAL for Hatley during the December 2008 appeal from the Clerk's denial of Hatley's motion to restore competency.

31. Small did not have any basis to seek payment of his GAL fees from the heirs of the Hatley Estate or the estate Administrator individually.

32. The Complaint was not warranted by existing law or good faith argument for extension, modification or reversal of existing law.

33. The Complaint was interposed for the improper purpose of circumventing the Clerk's order requiring the Hatley Estate to obtain approval for Small's GAL fee. Small's District Court lawsuit was frivolous.

34. The Hatley Estate Administrator was served with the Complaint on 14 September 2009.

35. Attorney Grant represented the Hatley Estate and its administrator in Small's District Court lawsuit. The other defendants named in the Complaint (the remaining Hatley heirs) were represented by Attorney Rogers.

36. On the same date that Small filed the Complaint, Small filed a Notice of Hearing stating that he would move the court on 28 September 2009. Small did not provide any information about the substance of his motion nor did Small cite any applicable Rule of Civil Procedure in support of his motion.

37. Attorneys Grant and Rogers duly appeared with their clients on 28 September 2009 in response to Small's notice of hearing.

38. At the hearing, Small informed the court in front of all present that Attorney Rogers was required by applicable ethical considerations to withdraw from his representation of the Hatley estate heirs (defendants named in the Complaint) and that Small would report Attorney Rogers to the State Bar.

39. Small based his claim that Attorney Rogers was required to withdraw from his representation of the Hatley Estate heirs on the fact that he planned to call Attorney Rogers as a witness.

40. There was no credible basis upon which to assert the claim that Attorney Rogers was a necessary witness in the matters pending between Small and the Hatley Estate and its heirs.

41. Small served no proper purpose by noticing the 28 September 2009 hearing. Small's actions at the hearing served no proper purpose and were intended to unjustifiably delay the litigation and to harass, annoy and hinder Attorney Rogers in his attorney-client relationship.

42. On or about 23 September 2009, Attorney Grant filed a motion to dismiss the Complaint pursuant Rule 12(b)(1)(3) and (6). Attorney Grant filed this motion before the time to answer the Complaint expired.

43. On 16 October 2009, Small filed motions for entry of default and default judgment. At the time that Small filed these motions, pursuant to N.C. Rule of Civil Procedure 12(a)(1)a. the time for Attorney Grant's client to answer the Complaint had not yet expired.

44. There was no basis in law or fact for Small's motions for default and default judgment. Defendant's motions for default and default judgment were frivolous.

45. On 14 October 2009, Attorney Grant wrote Small asking him to allow issues regarding Small's GAL fee to be resolved within the Hatley Estate proceeding before the Clerk.

46. On 30 October 2009 and after Attorney Grant's 14 October 2009 letter, Small appeared *ex parte* before Judge Thigpen (who presided over Hatley's December 2008 Superior Court appeal of the motion to restore competency) to present a "Motion and Order for Payment of Guardian Ad Litem Fees."

47. Although Small knew that the fee he sought to collect pursuant to the Motion and Order for Payment of Guardian Ad Litem Fees was disputed in his District Court lawsuit and the Hatley Estate matter, Small did not give notice to Attorney Grant, Attorney Rogers or the Hatley Estate Administrator that he would present this motion to Judge Thigpen.

48. Small concealed the fact that his motion was disputed from Judge Thigpen.

49. By order dated 6 November 2009, the District Court dismissed the Complaint pursuant to Rule 12 of the North Carolina Rules of Civil Procedure and dismissed Small's motions for entry of default and default judgment.

50. On 13 November 2009, Small filed an appeal from dismissal of the District Court case and from the denial of his motions for entry of default and default judgment. Small set his appeal for hearing on 25 January 2010.

51. On 31 December 2009, Attorney Grant filed a motion for sanctions against Small. Small was notified by copy of Attorney Grant's 31 December 2009 letter to the Cabarrus County Civil Trial Court Coordinator ("TCC") that the motion for sanctions was set for hearing on 25 January 2010.

52. On 5 January 2010, the TCC served Smalls with card notice of the 25 January 2010 session calendar on which Smalls v. Hatley Estate et al. was listed for hearing.

53. On 6 January 2010, Small dismissed his appeal.

54. A hearing on the issue of whether Small should be sanctioned was held on 25 January 2010. Small did not appear in court for this hearing.

55. Small was sanctioned by the court on 25 January 2010.

56. On 28 January 2010, Attorney Grant hand delivered to Small a copy of his letter to the TCC enclosing the proposed order for sanctions against Small.

57. On 9 February 2010, Attorney Grant mailed Small a stamped “filed” copy of the order for sanctions entered against Small.

58. Small filed a motion to set aside the 25 January 2010 order for sanctions. The other parties filed a motion for contempt based on Small’s failure to comply with the order for sanctions. The hearing on this motion was set for 22 March 2010 and continued to 25 March 2010.

59. Small falsely stated to the court on 25 March 2010 that he did not have notice of the 25 January 2010 hearing on the motion for sanctions. Small stated that he believed that the 25 January 2010 hearing date had been canceled because he dismissed his appeal.

60. Small falsely represented to the court on 25 March 2010 that he did not receive notice that the order for sanctions was entered until after the deadline to comply with the order had already passed.

61. Upon receipt of information about Small’s conduct in the Hatley matter, The North Carolina State Bar opened grievance file 10G0398. On 25 May 2010, Small was served with a Letter of Notice notifying him of the allegations in file 10G0398.

62. The Letter of Notice informed Small that he was required to respond within 15 days. Small requested, and was allowed, approximately two additional months in which to submit his response to the State Bar. Under the extended deadline Small’s response was due 6 August 2010.

63. Small failed to submit a response to grievance file 10G0398 by the 6 August 2010 deadline. On 17 August 2010, the Office of Counsel sent Small a letter informing him that his response was late and reminding him that failure to respond to a letter of notice may in itself form the basis for discipline.

64. Small did not respond to the Office of Counsel’s 17 August 2010 letter.

65. On 2 September 2010, the Office of Counsel sent a letter informing Small that if he did not respond immediately, file 10G0398 would be reviewed by the Grievance Committee without a response.

66. Small failed to submit his response to the Letter of Notice until 22 September 2010.

THEREFORE, Plaintiff alleges that Defendant's foregoing actions constitute grounds for discipline pursuant to N.C.G.S. § 84-28(b)(2) in that Defendant violated one or more of the Rules of Professional Conduct in effect at the time of his actions as follows:

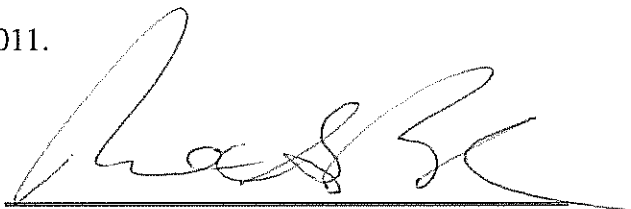
- a) By filing the Complaint against the Hatley Estate and its heirs individually seeking to collect a \$175.00 per hour fee for his service as GAL in disregard of the Clerk's Order that the Hatley Estate obtain approval for Small's fee, Small attempted to collect an illegal fee in violation of Rule 1.5(a) and made a frivolous claim in violation of Rule 3.1;
- b) By scheduling a hearing on 28 September 2009 without giving the parties prior notice of the matter to be heard and by making baseless assertions as the hearing that Attorney Rogers was required to withdraw from his representation of the Hatley heirs because he was a witness in the case, Small used means that have no substantial purpose other than to embarrass, delay or burden a third person in violation of Rule 4.4(a) and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d);
- c) By filing motions for entry of default and default judgment before the time to answer the Complaint expired, Small made frivolous claims in violation of Rule 3.1 and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d);
- d) By appearing *ex parte* before the Honorable Cressie H. Thigpen to present the "Motion and Order for Payment of Guardian Ad Litem Fees" and by pursuing payment of his fees from Judge Thigpen when he knew the matter was being contested in both the estate matter and in the lawsuit he filed, Small communicated *ex parte* with a judge in violation of Rule 3.5(a) and engaged in conduct prejudicial to the administration of justice;
- e) By falsely stating to the court that he did not receive notice of the 25 January 2010 hearing on motion for sanctions and falsely stating that he did not receive notice of the 9 February 2010 Order awarding sanctions, Small made false statements of fact to the tribunal in violation of Rule 3.3(a) and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c);
- f) By failing to comply with the 9 February 2010 Order awarding sanctions, Small knowingly disobeyed the rules of a tribunal in violation of Rule 3.4(c); and

- g) By failing to timely respond to the Letter of Notice in grievance file 10G0398, Small knowingly failed to respond as required to a lawful inquiry by a disciplinary authority in violation of Rule 8.1(b).

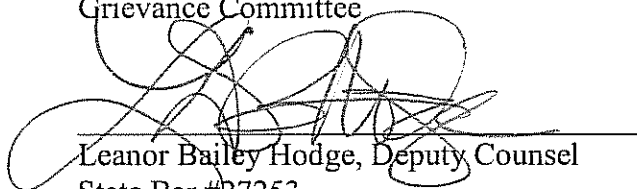
WHEREFORE, Plaintiff prays that

1. Disciplinary action be taken against Defendant in accordance with N.C.G.S. § 84-28 (c) and 27 N.C.A.C. 1B § .0114 as the evidence on hearing may warrant;
2. Defendant be taxed with the administrative fees and with actual costs permitted by law in connection with the proceeding; and
3. For such other and further relief as the Hearing Panel deems appropriate.

This the 20<sup>th</sup> day of April, 2011.



Ronald G. Baker, Chair  
Grievance Committee



Leonor Bailey Hodge, Deputy Counsel  
State Bar #27253

*Attorney for Plaintiff*  
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